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MEMORANDUM OF LAW

DATE: September 25, 1998

TO: Cindy J. Shanley, Claims Aide, via Charles E. Mueller, Jr., Deputy Risk Management Director

FROM: City Attorney

SUBJECT: Retroactive Conversion of Catastrophic Leave Time to Long-Term Disability Benefits

QUESTION PRESENTED

When a City employee chooses to use catastrophic leave in lieu of long-term disability [LTD] benefits, does the employee have the right to retroactively convert her choice to LTD benefits and obtain reimbursement of the catastrophic leave?

SHORT ANSWER

No. Once an employee chooses to use catastrophic, annual, or sick leave in lieu of LTD benefits, the employee is not entitled to convert the leave used to LTD benefits and thereafter be reimbursed for the leave used.

DISCUSSION

I. Background Facts

A City employee applied for LTD benefits. The City found the employee eligible for LTD benefits beginning March 5, 1998, and informed the employee of her eligibility. The employee chose instead to use catastrophic leave that had been donated to her by other employees in lieu of LTD. The employee signed and dated the following statement documenting this choice:

I acknowledge that I am eligible for Long-Term Disability benefits commencing 3-5-98 but elect to use my accumulated sick leave credits during my disability period.

I understand that this does not prevent me from receiving Long-Term Disability benefits if my accumulated leave credits are exhausted providing I meet the requirements as defined by the Long-Term Disability Plan.

The employee used catastrophic leave until those hours were depleted. The employee then received LTD payments from April 10, 1998, until her return to work on July 15, 1998. After returning to work, the employee requested that the catastrophic leave used from March 5, 1998, through April 10, 1998, be reimbursed to her leave account, and that LTD benefits be applied to that time period instead.

II. Catastrophic Leave And LTD Are Separate, Non-Interchangeable Benefits

A. Catastrophic Leave

The City's "Catastrophic Leave Plan" allows City employees to assist other City employees who face extended leaves without pay due to a catastrophic occurrence in their lives. To qualify for an extended leave, an employee must expect that his or her annual leave will be exhausted by an event that is covered by the Family and Medical Leave Act of 1993 (29 U.S.C. §§ 2601-2654). If an employee qualifies, a catastrophic leave bank is established for the employee (the donee). Other employees may then donate their accrued annual leave. The donated leave is converted at the donor's rate of pay to a dollar value and then converted into leave hours at the donee's rate of pay.

Once catastrophic leave has been donated and converted to annual leave held by the donee, the catastrophic leave is treated just like annual leave accrued by the donee. Indeed, for all intents and purposes, once the catastrophic leave is converted, it is annual leave belonging to the donee employee. The donor employee no longer has any right to the leave, and as stated in the

Catastrophic Leave Plan, is not entitled to recover that leave under any circumstances. As with annual leave, the donee may use up to eighty hours of catastrophic leave each pay period, until the leave is exhausted. The donee continues to accumulate annual leave credits while using catastrophic leave.

B. Long-Term Disability Benefits

The LTD Plan was established by the City to provide income to employees who are disabled as a result of injury, illness, or pregnancy. LTD Plan, § 1.01. The primary difference between annual leave (including sick or catastrophic leave) and LTD benefits is that annual leave is paid at 100 percent of the employee's pay rate, while LTD is paid at 70 percent. In addition, an employee receiving LTD does not accrue annual leave and does not receive contributions from the City to the employee's Supplemental Pension Savings Plan account. LTD Plan, § 5.11. LTD does not include "overtime, standby, bonuses, out-of-class pay, Management Benefit Plan benefits, and any other extra compensation." LTD Plan, § 5.12(A). No LTD benefits are paid for the first thirty calendar days of the qualifying disability. LTD Plan, § 4.02. An employee may not supplement LTD payments with annual leave. San Diego Personnel Reg. I-2, 4 (1996).

The LTD Plan permits reimbursement of annual leave in circumstances where an employee, who is eligible for LTD benefits, uses annual leave while applying for and waiting for a determination as to eligibility for LTD benefits. LTD Plan § 5.12(C). In that case, the employee must, within ten days after being notified of eligibility, communicate his or her decision to use either annual leave or LTD benefits. LTD Plan § 5.12(C)(1). If the employee decides to use LTD, then the annual leave is reimbursed. LTD Plan § 5.12(C)(2). If the employee decides to use annual leave instead of LTD, then the annual leave counts toward the employee's twelve months of eligibility for LTD. LTD Plan § 5.12(C)(3). As in this case, the employee is also requested to sign an acknowledgment of the employee's waiver of LTD benefits. Employees' LTD Income Plan, Summary Plan Description, 13. If the employee does not communicate a decision within ten days, then the situation is treated as if the employee chose to use annual leave instead of LTD, and the annual leave used by the employee is not reimbursed. LTD Plan, § 5.12(C)(4). The LTD Plan does not provide for reimbursement of annual leave outside of this limited circumstance.

C. Is an LTD-Eligible Employee Entitled to Reimbursement of Annual Leave?

Because LTD and annual leave are substantively different benefits that may not be used simultaneously, an employee who is eligible for LTD benefits and has available annual leave must choose between the two benefits. Once the employee has taken advantage of the chosen benefits, the employee has no right to substitute one benefit for the other.

This particular issue was addressed in a Memorandum of Law published by this office on March 30, 1989. 1989 City Att'y MOL 132. As discussed in that Memorandum, an employee requesting reimbursement is essentially asking the City to credit his or her account with the annual leave for which the employee has already received full payment, attribute the payments to LTD, and take no account of the differences between the two benefits. Thus, retroactive reimbursement of annual leave with LTD benefits creates a windfall to the employee and a detriment to the City. *Id.* at 133. Because of the detriment to the City and by virtue of the doctrine of estoppel, the employee is precluded from later receiving LTD benefits in lieu of the annual leave initially chosen and then taken. *Id.* at 134.

III. Reimbursement of Leave With LTD Would Result in a Gift of Public Funds

Reimbursement of leave in the limited circumstance described in section 5.12(C) of the LTD Plan is necessary for administration of LTD benefits. Reimbursement of leave outside of this limited circumstance would result in a gift of public funds.

San Diego Charter section 93 prohibits the City from giving or lending its credit to aid any individual, association or corporation. The purpose of this Charter section is to prevent expenditures of public money unless a valid public need will be served. 1991 City Att'y MOL 352, 353. When a proposed application of public money is questioned as a possible gift of public funds, "the primary and fundamental subject of inquiry is as to whether the money is to be used for a public or a private purpose." *County of Sonoma v. State Board of Equalization*, 195 Cal. App. 3d 982, 993 (1987) (*quoting City of Oakland v. Garrison*, 194 Cal. 298, 302 (1924)).

There is no public purpose or benefit involved when an employee seeks the return of annual leave to the employee's leave account under the circumstances described in this Memorandum. Accordingly, allowing reimbursement of annual leave outside of the limited circumstance provided for in the LTD Plan would result in an illegal gift of public funds to the employee.

CONCLUSION

In this case, the employee was informed of her eligibility for LTD benefits, chose to use annual leave, and documented that decision. The employee has received compensation for the annual leave that she used during her disability and is not entitled to reimbursement of that leave. Annual leave and LTD benefits are not interchangeable; crediting leave with LTD benefits outside of the limited circumstance set forth in the LTD Plan would result in a windfall to the employee, a detriment to the City, and an unauthorized gift of public funds.

Cindy J. Shanley

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September 25, 1998

CASEY GWINN, City Attorney

By

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